HOUSE OF LORDS

Charities Bill [HL] Special Public Bill Committee

Oral evidence: Charities Bill [HL]

Thursday 14 October 2021

11.55 am

Watch the meeting

Members present: Lord Etherton (The Chair); Baroness Barker; Lord Bellingham; Lord Cruddas; Baroness Fullbrook; Baroness Goudie; Lord Parkinson of Whitley Bay; Lord Ponsonby of Shulbrede.

Evidence Session No. 1 Heard in Public Questions 1 - 24

Witnesses

I: Chris Walker, Policy and Public Affairs Manager, National Council for Voluntary Organisations; Richard Hebditch, Director of External Affairs, Association of Charitable Foundations.

II: Laura Soley, Partner, Bates Wells; Lucy Rhodes, Senior Associate, Bates Wells; Nicola Evans, Charities Counsel, BDB Pitmans LLP (representing the Charity Law Association); Chris Priestley, Partner, Corporate, Charities & Philanthropy, Withers LLP (representing the Charity Law Association).

Examination of witnesses

Chris Walker and Richard Hebditch.

Q1 **The Chair:** Chris Walker and Richard Hebditch, we are extremely grateful that you are here. Thank you so much. We are extremely grateful for your organisations' written evidence in this matter. I am sorry you have been slightly delayed, but I hope we will catch up in a moment. Members of the committee will be asking questions. It will not be a monologue by me or anybody else, so the questions will come from different directions and there may be follow-up questions. Please feel free to add whatever clarification you want if you feel that the committee is not fully in possession of what you want to convey about the questions you are asked.

I will start by asking whether either of you would like to give an opening statement on the Charities Bill.

Chris Walker: I am happy to start with that. We very much welcome the Bill. We think it is an important piece of legislation and it has a varied range of measures that collectively will make a real difference to charities and the work they do. We think that the Law Commission did an excellent job in highlighting the issues and the recommendations that it has made and that it engaged very effectively with the sector to make sure that its recommendations were improved. Ultimately how it affects charities practically will be important, so implementation is important. The Charity Commission has a role in that in making sure that charities understand the changes to the law, but also that the guidance of organisations like the NCVO is accessible to members on what are sometimes quite technical matters.

The Chair: Thank you very much. Mr Hebditch, do you want to say anything?

Richard Hebditch: I will add our own backing for that. We very much welcome the Bill. We represent charitable foundations. We have about 400 members across the UK and they give about 40% of overall grants from foundations to good causes. It matters to them as charities, but also because they largely fund charities, so they very much want to have a good regulatory system. This is the particular interest for our members.

The Chair: Can you say something about the relative size of your 400 members?

Richard Hebditch: Some of them are very large. The Wellcome Trust is the largest and it tends to skew any figures about grant giving from foundations. It includes other large ones like the Esmée Fairbairn Foundation and the Paul Hamlyn Foundation, but also very small foundations such as community foundations and individual family foundations with relatively small assets. Our 400 members give about £2.5 billion each year.

The Chair: Can I take it that the NCVO is primarily interested in smaller

charity giving?

Chris Walker: We have 16,000 members and it is a fairly representative cross-section. We represent large household name charities, but a vast majority of our membership is at the smaller end.

The Chair: That is all I wanted to ask by way of an opening statement.

Q2 **Lord Ponsonby of Shulbrede:** How do you think the Bill achieves a balance between removing inappropriate regulation while safeguarding the public interest?

Chris Walker: We think it strikes quite a good balance. The Law Commission's work on this has considered that very carefully. It has looked through each regulation. There are some areas where the risk is quite low and it has highlighted areas where it should be reasonably straightforward, but I think it has also navigated some quite tricky areas. For example, fundraising is an important issue for charities in the relationship between the donor and the charity and making sure that the charity carries out the donor's wishes. It probably has the balance right where it has needed to think about how the public interest comes into these things.

Richard Hebditch: We think that generally trustees are best placed to make the decisions for their organisations, but they are human beings, so the framework in which they make decisions is also important to help them make the right ones. From a foundation point of view, as well as thinking about the current public interests and the extent to which organisations and trustees are making decisions in the wider context, it is also thinking about the extent to which they are balancing the current generation against future generations. I think trustees will always tend to foreground the immediate issues around them. They will try to consider the long term, but it is also important that there is a consideration, particularly with endowments, about the future generations and how endowments are spent, for instance.

Lord Ponsonby of Shulbrede: I understand that you are at different ends of the sector from the large to the smaller. To what extent have you consulted with each other about the overall scope of the regulation versus the safeguarding conundrum, since you have such different memberships?

Richard Hebditch: It has been a Bill in long gestation, so we have consulted over a long time. I think the original consultation was in 2015 and we consulted our members then. We have kept in touch with progress when there has been progress. We broadly understand that our members are supportive of the Bill and what the Bill says, from their interests as grant-giving foundations, but also that they think it should help individual front-line charities.

Chris Walker: I think it is similar. A lot of our more detailed consultations are probably historic, but we have spoken to quite a few people. We have worked quite closely. Our submission to the committee

was trying to bring in other people and involved speaking with colleagues in the sector, primarily infrastructure bodies, but we have spoken to some member charities as well.

Q3 **The Chair:** I now come to a critical part of our job, which is to consider whether the Government are right to reject, or only partially accept, certain Law Commission recommendations. We have set them out: 6, 7, 8, 16, 18, 27, 40 and 43. We welcome your view on these and will take them one by one. You do not have to give a long answer to each one, but I think it would be particularly useful to the committee to hear about your own personal experience and whether you have encountered the situation of any these rather than dealing with them hypothetically. We will start with Mr Walker going through the various recommendations that were rejected.

Chris Walker: If it is helpful, I will group the royal charter ones together. We have not taken a particular interest in these, but I think all those specific recommendations are non-legislative. In practice, we hope that in future the Government and others will keep an open mind on them. For example, if it becomes clear that there is a demand for a user group to reflect on how the changes have affected royal charters, it would be sensible to set one up, as the Law Commission recommended. I see those as recommendations that should not be just set aside and forgotten but considered in future.

The Chair: That is 6, 7 and 8. What about the others? Are there any others?

Chris Walker: Yes. I think that 16 is wholly owned subsidiaries in land transactions. I do not think we commented on this in our evidence, but we recognise that there is an issue, and the Law Commission did some important work in highlighting that there were potential challenges for charities on this. Our sense, having spoken to people who work on our government side, is that often there are issues where there are potential conflicts between wholly owned subsidiaries and the charity. The Charity Commission has said that this particular issue comes up quite a bit in its casework. We probably agree that on the balance of risk the Government are right to reject that recommendation at this point.

The Chair: Thank you. Then we have 27, which is the advertisement and sale of designated land.

Chris Walker: I think that is 18. I have memorised all of them. This is another one where we agree with the Government. It is certainly a burden for charities to have to advertise and it is an issue, but our experience is that this is a very challenging area. There was clearly a lot of public interest in how you might use particular land or assets. We think it is in the public interest, but also probably in the interest of the charity, that if there are any issues arising they should be aware of them, so the advertising process is important. We said in our evidence—it is quite a complicated process, so I would not say that it should be done now—that, in the future, as has been done in other areas of the Bill we could look at

whether you can identify particular low risk factors that would allow you not to have to go through that process if it was thought to be quite a low-risk transaction. I think that is quite challenging.

The Chair: Number 27 is appeals.

Chris Walker: We do not have major concerns with this one. The Government's argument is that this was considered at the time of the 2011 Act and they thought about all these things carefully. All the different routes are quite confusing. There is scope to consider it in further reviews. I hope it might be something that we come back to at some point in the future. As we now have 10 years' experience of the Act working in practice, it would be good to go back and see whether the things that we thought at the time were correct.

The Chair: You do not feel strongly that the Government were wrong to say, "We do not want to go into that".

Chris Walker: It is certainly not one where we would push back strongly.

The Chair: Then we come to 40, where I think there are different views.

Chris Walker: We disagree with the Government's approach on this one. Our view is that this is an issue that arises or could arise where the Charity Commission has a conflict of interest. We understand the Government's concern and the Charity Commission's concern over this: that you will end up with matters that could be resolved without having to go through the legal process. But our view is that we would not expect that to happen. We think that you can manage this reasonably sensibly. The court could take into account the likelihood of something being able to be resolved by other means. Our expectation is that when you are talking about a conflict of interest in this sense it would not be enough, for example, for the Charity Commission to have to make the decision on something for it to be a conflict of interest. It has to be more than that. We think that on balance it would be helpful for that route to exist, and we disagree with the Government on that one.

The Chair: Have you had any personal experience of a situation where the commission has been in a conflict?

Chris Walker: I do not think so. I can check with colleagues as to whether we have, but not personally, no.

The Chair: Finally, we have 43, which is the ability of the Charity Commission to make an application without the consent of the Attorney-General.

Chris Walker: We agree with the Law Commission recommendation, which I think was originally Lord Hodgson's recommendation. We think the Charity Commission is perfectly capable of exercising this power. I think the way in which it has sought to use this power through the Attorney-General has been entirely reasonable. It has shown that it has

been quite cautious over it. The Royal Albert Hall is only the third time that it has tried to use this power. We agree and there is clearly a role for the Attorney-General in overseeing the way that charity law operates. If you look at the process for the decision made on the Royal Albert Hall, it is a complicated and challenging issue, but that that process has taken four years shows that there is something wrong with the way it is operating.

The Chair: Thank you very much. Is there anything else you want to add on this question?

Chris Walker: No, I think that covers everything.

The Chair: Mr Hebditch, will you go through the same process?

Richard Hebditch: I suspect I will just say I agree with Chris.

The Chair: That is good.

Richard Hebditch: I do not disagree with anything that Chris has just said. I agree with all those points. On the Attorney-General point, it is only three cases, but in one case it was taken through. That is one out of three, a third of those, and it suggests that there is a slight issue there.

Q4 **The Chair:** I want to follow up very briefly on the question of the conflict of interest point. It has been pointed out by the Attorney-General that if the permission is refused by the Charity Commission, there is still provision for an application by the charity to be made to the court, in due course, for permission to bring the proceedings none the less. That in a sense reduces the matter to one of timing: how long it is all going to take. I think it is correct that there is provision in the 2011 Act for a subsequent application by the proposed appellant where permission has been refused and one can deal with this by imposing a time limit on the Charity Commission to respond. If it does not respond within the time limit, the charity can go ahead and take its proceedings. Is that one way of dealing with the matter?

Chris Walker: Yes, I think it is. Clearly one of the problems with going through that route is that it will take quite some time. We agree that that is one possible solution.

The Chair: It is a very important part of our brief to consider the rejections by the Government. Does the committee have any questions arising out of the last question?

Q5 **Lord Cruddas:** Are smaller charities advantaged or disadvantaged by the Bill? If disadvantaged, what would you recommend?

Chris Walker: Generally the Bill will be most helpful to smaller charities. If you look at how they will engage with these things, particularly where it is making it easier for the difficult areas of certain legal disputes over land and endowments, that is where I think smaller charities will struggle most under the current system, so having a bit more flexibility on that is very useful. Generally, larger charities will be more able to cope with

these kinds of technical difficulties. They will be more easily able to access legal advice and they may have governance specialists. I think that making those regulations more straightforward will help the smaller charities the most.

There is one issue where perhaps there could be a challenge for smaller charities. The proposal to align quite a lot of the thresholds by changing governing documents to 75% rather than two-thirds feels to us like it could be harder for smaller charities to make amendments. That is one area of concern from the small charity perspective.

Richard Hebditch: I think there was mention in the last oral evidence session about the staggering of some elements of the Bill. There might be questions about whether this is one to make sure that smaller charities have time to consider it as well. One thing that I think might be of benefit to smaller charities is the recommendations and clauses about defining who is a trustee. Often in smaller charities there are issues historically where the governance has not been particularly good where it is unclear who is a trustee; I have personal experience of that. But it also depends on the Charity Commission having the resources to be able to follow it up. There have often been issues where things have been stuck at the Charity Commission for some time. I think the budget of the commission has halved in real terms over the last 10 years. It has increased in recent years, but it is important that the commission has the resources to be able to fulfil its duties.

Q6 **Baroness Barker:** An issue that has been somewhat controversial in some circles is that the Bill proposes different thresholds for changing governing documents between different types of charities that are constituted in different ways. What do you think about that?

Chris Walker: I think co-ordination is good where it is possible and it has benefits, but it is important to think what the effect will be on charities in doing that and their abilities to make changes to governing documents. Our view is that where you are increasing the threshold to three-quarters, particularly for very small charities, some of which might have three trustees so essentially you are making it unanimous rather than two-thirds, that outweighs the benefit you get from aligning. If you think about how a charity would approach this issue, it will look at it from its perspective. Alignment is very useful if you are a charity governance specialist or a trustee of several charities with different legal forms, but for an individual charity the benefit of that alignment is probably outweighed by it being more difficult for you to make that change.

Q7 **Baroness Goudie:** Good morning. Do you have any comments about the level to which the Attorney-General has oversight of the Charity Commission, as affected by the Bill?

Chris Walker: I do not have much to add from the previous answer about the recommendation. I think the Attorney-General clearly has a role. I did not say earlier that the Attorney-General is a representative of the public interest on lots of these matters, but I think that the Charity

Commission would also consider itself as defending the public interest on these matters. That is the main issue we have with the Attorney-General on the Bill.

The Chair: Do you have anything to add?

Richard Hebditch: No, we agree with Chris.

Q8 **Lord Bellingham:** On the permanent endowment proposals, one option would have been to have lifted the restriction completely. Do you think the provisions make sense, particularly the provision to give the power to borrow to release some money from endowments? What is your view about portfolio offsetting?

Richard Hebditch: We are supportive of the measures in the Bill. I think the timing of this, after the Covid pandemic in particular, is interesting. We know from our members that at the beginning of last year when Covid first hit and there was the hit to investments, many were worried about how they might respond to the scale of the emergency while also seeing their investments fall and the need for those who have a permanent endowment to preserve the value of it.

The recommendations seem to us to be very straight, very sensible and thoughtful and we are supportive of them. In our original 2015 submission to the Law Commission we suggested raising the limit from £10,000 to £1 million for releasing the permanent endowment without Charity Commission permission. I understand why the Law Commission and now the DCMS are not going ahead with that proposal—they have a lower threshold—but I think it is one to keep an eye on and see whether it can be raised in time. Obviously that is with release of the full permanent endowment.

On portfolio offsetting, we are supportive of giving more flexibility to trustees to manage their investments to offset making a social investment that may not provide a large return or overall return with gains elsewhere in their investments. We are supportive of that measure. We think it is very sensible and a helpful change after what we have seen in the last year and a half.

Lord Bellingham: Was there much pressure from the charity world, among your colleagues to have the restrictions lifted completely?

Richard Hebditch: My feeling is that generally charities accept charity law and the legal framework. They recognise how difficult it is to get legislation on charities, so they always welcome when there is a charities Bill like this one. Things changed during the pandemic and foundations felt more able to make grants and maintain their level of spending, which is what we have seen from the surveys of our members. I think that pressure went away as well.

Q9 **Baroness Barker:** The proposal on working names was not part of the original Law Commission report. It was done in response to some of the submissions that were made. Do you think the Government have thought

through the ramifications of the proposal on working names?

Richard Hebditch: We have discussed this a few times. The proposals look sensible to us. I think it would be useful to have reporting back from the Charity Commission about how the power has been used and where there have been disputes over its use. I cannot see from the legislation that there would be serious issues if the Charity Commission applies it sensibly. There is sometimes an issue about naming rights, but I do not think that would apply to working names as opposed to projects that a charity might pursue.

Baroness Barker: That is interesting, is it not? I know from my time in some charities that it was not possible for them to trademark a name and, therefore, they had to resort trademarking brands as opposed to names. Thank you very much. You have made a very interesting point.

Chris Walker: I completely agree. I think the working names proposal is potentially very useful, because where you have confusion the working name is often the bigger challenge. There may be some issues to think about, but it is a very useful proposal.

Q10 **The Chair:** What about recommendations that are not in the Bill and that you think would be good? They have to fall within the remit of what we are looking at now. None of the big issues is about what a charity is; it has to be the same kind of technical aspects of charity law that the Bill deals with. Is there any technical aspect of charity law that you think ought to have been or ought to be considered that is not currently in the Bill?

Chris Walker: I think some of the issues were explored. If I go back to recommendation 27, I get the impression, looking at the report, that the Law Commission would have happily looked at those issues, but because it was not within their remit it was not able to do so. I think it would be useful to come back to that at some point.

Richard Hebditch: I do not think so in the context of this Bill, no. I make the point I was making earlier, beyond the scope of the Bill, about the resourcing for the commission and ensuring that it has good governance, including the appointment of the commission chair.

The Chair: You are not the first person to make that point. Is there anything you would like to add over and above the questions that we have asked and the answers that you have given?

Richard Hebditch: I do not think so. I just reiterate the point about our support for the Bill and we hope to see it passed soon.

Chris Walker: Yes, the same from us. One thing might be to think about the best way to sequence this coming in and what will make it easiest for charities to understand how to apply changes in the law.

Q11 **Lord Bellingham:** The soundings I have taken in my own locality are that most charities and the charities I am involved with have not really

focused on this Bill at all, to be honest. They are coming out of the Covid crisis and have so many other priorities, and when I have mentioned this Bill to them they have been quite surprised—I think pleasantly surprised.

When the Bill starts to make its way through Parliament, do you think that there will be any campaigning to use this as an opportunity to make various changes, particularly when it gets to the other place? Do you think there will be serious pressure put on MPs from some charities in some areas to make additional specific changes? If that was the case, where do you think the pressure might build up?

Chris Walker: I do not anticipate that that will be the case. I think you are right to the extent that charities know that this is coming and that it is various changes to technical law. Because this is a Law Commission Bill, it has become quite clear, although as charities we are not experts on that process and we would have to learn along the way, that there is not that much scope with new recommendations. The impression I get is that MPs in the Commons recognise that this is important legislation and they want to get it through and understand the limitations.

I think in your question there was also a question about how charities will come to understand this. We have certainly talked about it, but it is a difficult one to grasp in the abstract as a charity. We definitely plan to provide some practical support for this as changes are implemented, but I think there also has to be a recognition that charities will probably not see it as a change in the law and take that on board. We have to make sure that when one of these issues comes up and they go to guidance, whether that is Charity Commission guidance or what we have said about something, it is really accessible and they can understand how they can use that measure to their advantage.

Lord Bellingham: Mr Walker, will the NCVO be writing to MPs about the Bill?

Chris Walker: I think we will brief MPs on the Bill, but I do not think we will be pursuing amendments.

Q12 **The Chair:** Looking at implementation, I think your take on it, or your approach, is that sequencing is very important, not all at once because charities have to become familiar with it. They have things that they have to do with their own constitutions and so on and clarity of what needs to be done. If I have understood you correctly, those are the two critical elements in implementation.

Chris Walker: To some extent on understanding, I think there is an advantage in having changes come together, because then you can engage with them collectively, but that is probably not the way charities will engage with these changes. The disadvantage of bringing everything in together is that you are slower to implement some changes that could be making a difference more quickly. On balance, not doing it all at once might be the best option, but possibly for slightly different reasons.

Richard Hebditch: On Lord Bellingham's question, I do not think we will see amendments being proposed in the House of Commons. Charities might ask their MPs to raise concerns more generally and just use the Bill as an opportunity for that, but I do not see many charities wanting to table amendments to it. We and the NCVO are certainly advising our members that it is a Law Commission Bill and that we would like to see it passed.

The Chair: We are all grateful to you. It is extremely helpful to have your views on these matters. Thank you very much indeed.

Examination of witnesses

Laura Soley, Lucy Rhodes, Nicola Evans and Chris Priestley.

Q13 **The Chair:** We are extremely grateful to you for coming along today to assist this special Law Commission procedure for uncontentious Law Commission legislation. We are sitting unusually as part of our procedure as a Special Public Bill Committee taking evidence. We are very grateful indeed for the extensive written evidence that has been provided by you or those you represent. Broadly speaking, I describe you as either Bates Wells on the one hand or the Charity Law Association on the other hand. I am afraid that your little nameplates are too far away for me to see; I need my long distance glasses for that. It would be helpful to me if you could introduce yourselves first of all so that if anybody is in the same position as me we know exactly who is speaking.

Laura Soley: I am a partner at Bates Wells.

Lucy Rhodes: I am a senior associate at Bates Wells.

Chris Priestley: I am a partner at Withers, but I am here in my capacity as a board member of the Charity Law Association.

Nicola Evans: I am the charities know-how lawyer at BDB Pitmans and I am here in my capacity through the CLA where I chaired the working party response to the main consultation that led to this Bill.

Q14 **The Chair:** I see. That is the way the Charity Law Association works. You have your own firms, but you are working as part of this association. Very good.

We will ask you a number of questions. There may be slight variations on the ones you may have thought we were going to ask, primarily because, as you will have seen now, Professor Hopkins has made his comments on the written evidence that was given on behalf of your two bodies. We may vary them slightly, or you may want to vary your answers slightly from those you would have given to deal with that. Please feel free and unconstrained in giving your answers. If you think that we have not sufficiently understood them or you want to further clarify them, please do not feel that you are constrained in any way—do clarify, do elaborate if you would like to. At the end we will give you an opportunity to add

anything further that you think may be material to assist us on this.

It would be helpful to the committee, bearing in mind all the evidence that we have now seen, including Professor Hopkins's further evidence, if you would make an opening statement generally about the Bill. We will start on the left and work to the right.

Laura Soley: Bates Wells is a law firm specialising in advising charities and social enterprises. We have a very large team of charity lawyers and we advise thousands of charities. We have been engaged in the Charities Bill throughout the process, having made our firm's own submission to the Law Commission's first consultation and to the supplementary consultation as well as participating in the Charity Law Association's working parties.

We are aware that the Law Commission's objectives are to make the law simpler for the charity sector by clarifying uncertainties and removing unnecessary regulation while retaining sufficient safeguards. We very much welcome the Charities Bill, which by and large achieves these objectives. The Charities Bill deals with a number of technical issues conferring helpful new powers on trustees and the Charity Commission alike, including clarifying some areas that have caused confusion for charities and their lawyers for many years. We particularly welcome the new broader power for unincorporated charities to amend their governing documents, the more flexible provisions for disposing of charity land and the new power for charities to make small ex-gratia payments without Charity Commission involvement.

However, there are some issues where we feel that the Charities Bill does not necessarily strike the right balance and needs some fine tuning, particularly in the alignment of the powers of different types of charities to amend their governing documents where we feel that the balance between the perceived benefits of alignment of the different regimes and simplifying the law has not quite been achieved. We flagged some of those particular issues in our submission and we can talk about them further today.

In considering the balance to be struck, we have been very mindful that over 40% of registered charities have income of less than £10,000 a year and that small charities often do not have access to legal advisers. The law needs to be as accessible as possible to them. In preparing for today we have also had the benefit of sight of the Law Commission's supplementary evidence, which included their comments on our submission to this committee, and we have considered this in our responses.

Lucy Rhodes: I will not add anything further to what my colleague has said. In the interests of time, we have divided up the questions.

The Chair: That is good. Thank you very much. Does the Charity Law Association have any views on this?

Chris Priestley: I and Nicola Evans appear this afternoon in our capacity as members of the Charity Law Association. The CLA is a not-for-profit membership organisation with over 100,000 members, mainly charity lawyers, who support the aim of the CLA to advance education in charity law and to promote desirable changes in charity law. Nicola kindly chaired the CLA's working party on the Law Commission's 2015 consultation paper, *Technical Issues in Charity Law*, and combined working parties that have liaised with the Law Commission since then, including on the draft Bill itself. I have been involved in these working parties and as a member of the board of the CLA have chaired the ongoing CLA working party that commented on the Bill earlier this year.

It is worth noting on the evidence we give today that we do so to represent a number of our members' views, which are given in a personal capacity rather than being the view of the CLA or its membership as a whole.

We very much welcome this technical Bill and support its aim to remove unnecessary regulation and bureaucracy to maximise the efficient use of charity funds. We, too, wish to ensure that the legal framework that charities and their trustees must navigate is fair, modern and cost effective. We have given evidence on areas where we feel the Bill could do with some further improvement. In particular, we have been guided by a desire to ensure that the regulation of charities must work for smaller charities with much more limited resources and that regulation must be proportionate and fair.

Q15 **The Chair:** Thank you very much. The Bill seeks to achieve a balance between regulation and public interest. In a sense, you have all referred to this balance that is being maintained, and of course there are different views as to balance. It may be that two slightly different views are appropriate.

It would be helpful, before we turn to the specific provisions and recommendations rejected in whole or in part by the Government, to have an insight into your views, or those of the bodies you represent, about that balance and about particular elements where, even in the light of the response of the Law Commission in Professor Hopkins's supplementary evidence, you think it has gone badly wrong—that it is not just a matter of tinkering slightly but that something has gone substantially wrong and with which you disagree. Would you like to address those again, if we can start from the left?

Laura Soley: By and large, we do think that the Bill achieves a good balance between removing inappropriate regulation and safeguarding public interest. For example, the Bill introduces some helpful new powers for trustees, including the power for charities to make small ex-gratia payments without Charity Commission consent and to change the purposes of funds on a failed fundraising appeal.

The Bill strikes a good balance by imposing what we think are appropriate financial limits to these powers. For example, the power to make small

ex-gratia payments only allows the smallest charities to make ex-gratia payments of up to £1,000 per year and the largest charities to make ex-gratia payments totalling £20,000 a year, above which the Charity Commission must be involved.

We also welcome the reduction in red tape in relation to the requirements to be met on disposing of charity land, while retaining a clear framework within which trustees must operate. We are conscious that the Bill contains provision for the Secretary of State to raise financial thresholds in relation to various provisions in the Bill, such as those financial limits on small ex-gratia payments, which is very welcome. We do hope that the financial limits will be reviewed at regular intervals to make that sure the provisions are kept up to date, so that their usefulness does not diminish over time. We understand that the intention is that they are reviewed every 10 years, starting from next year, which is very welcome.

We also note that whether the new powers and provisions in the Bill do strike the right balance between simplifying the law and ensuring appropriate safeguards will also depend on how the Charity Commission operates some of the new provisions. It depends on the Charity Commission producing guidance, but there are a few areas where we do not think the Bill necessarily strikes the right balance, including in relation to powers to amend governing documents, the repeal of certain powers that currently apply to small charities, and the Charity Commission's new powers in relation to working names, which we talked about in some detail in our submission and which we will cover in relation to some of the other questions today in more detail.

The Chair: Your concerns are, in particular, amendment of governing documents—the one you just mentioned now—which is the working names. What was the second one?

Laura Soley: The repeal of the powers for small charities under Sections 268 and 275 of the Charities Act.

The Chair: Ms Evans, is that the correct way to address you? Are you happy with that?

Nicola Evans: I am happy with that, or Nicola. Thank you. As has been noted already, of course one of the aims of the Bill is to remove unnecessary regulation and bureaucracy for charities, but to do that while maintaining appropriate oversight. That was certainly something that we in the CLA working party kept in mind, in that we developed a number of principles to keep in mind as we responded to the proposals. One of those was that one of the outcomes should be that it should be easier to run a charity, while maintaining proper oversight and accountability. We think that the Bill achieves that.

On your question, I would not say that there are points that are badly wrong, but there are points where we think there is room for improvement. The working names point has been mentioned already, and we have already raised concerns through our evidence on that point.

We have one point to raise in respect of where the threshold sits on permanent endowment and whether it is pitched at quite the right level in comparison with the process that we have now. As Laura mentioned, a lot of how this will work in practice for charities is not necessarily in the Bill, but it will be in the implementation by the Charity Commission. That is one of the areas we might want to look at, given the concerns raised in respect of Section 275 and Section 268 for smaller charities, in that some aspects of that are points in the Bill, but there are other aspects that at present are not in the Bill but would be for the Charity Commission process. I suppose the question then is: is there a problem that needs to be solved with a legislative solution that cannot be solved by the Charity Commission's process?

Q16 **The Chair:** That is very helpful. Thank you. Can we get to what for us is one of the central aspects of scrutiny, which is whether you feel that the Government were right to reject, or at least only partly accept, Law Commission recommendations 6, 7, 8, 16, 18, 27, 40 and 43? I think it would be helpful if you dealt with each of them one by one as briefly as you could, but certainly giving us the benefit of the essence of what you want to say about them. Shall we start with the CLA this time on those particular recommendations and their complete or partial rejection by the Government?

Nicola Evans: In summary, the working party was in support of all the recommendations bar one, broadly for the reasons given by the Law Commission in each of those cases. I can summarise each one in a moment, should you wish. The one exception is recommendation 43, which the working party rejected, broadly for reasons given by the Government when they rejected it.

The Chair: Right. So you are with the Government on 43.

Nicola Evans: Yes.

The Chair: But you are with the Law Commission on the other ones. Is there anything specifically you want to add? For example, in relation to the royal charter charities, do you have experience in your association in dealing with those matters?

Nicola Evans: Certainly in each of our practices, yes. The recommendations that were rejected tend to be more about guidance to be produced by the Privy Council Office or other government departments such as DCMS, rather than necessarily legislative solutions. We probably have a tendency to support more guidance than less, which I think would account for the positive response from the working party members in terms of being offered more guidance and transparency of the processes, for example when it comes to amending a royal charter and underlying documents.

Chris Priestley: It is fair to say that the Privy Council already does provide extensive guidance, and the experience of practitioners dealing with royal charter charities is that the Privy Council is incredibly helpful

and goes out of its way to make the process as simple as possible. We also must bear in mind that a very small proportion of the 186,000 registered charities are royal charter charities.

The Chair: What about Bates Wells's position on these?

Lucy Rhodes: We broadly agree with the position that the Government have taken in relation to the Law Commission's recommendations. Recommendation 6, which was the first of the recommendations on royal charter bodies, contained the Law Commission's proposal that the Privy Council review its policy of requiring royal charter bodies to publish petitions for charters and supplemental charters in the *London Gazette*. We appreciate that this is intended to provide a layer of transparency, although we query whether publishing petitions in the *London Gazette* achieves that, given that it elicits so few comments.

It is not an issue that we feel very strongly about because so few chartered bodies go through this process. Most of our royal charter body clients have an express power of amendment in their charter, or they will be able to rely on the new statutory power of amendment. When relying on those powers it is not necessary to go through the petition process, so we do not think that it will affect many royal charter bodies.

The second part of recommendation 6 was the proposal that charters and supplemental charters should no longer be required to be printed on vellum. This was a proposal that we put forward in our response to the Law Commission's original consultation on the basis that we see this as a completely unnecessary expense for charities. I believe it costs something along the lines of £300 a page. Since making the suggestion, and possibly since the Law Commission published the issue in its report, we have found the Privy Council in practice to be quite flexible about this requirement. Our clients are not required to use vellum for their charters anymore. They have been given the option, so again we are comfortable with the recommendation being rejected by the Government.

Picking up on a couple of other recommendations, recommendations 16 and 18 related to certain changes to the charity land disposal regime. Again, we agree with the position the Government have taken in relation to these recommendations. In Bates Wells's submission to the original Law Commission consultation, we expressed support for the current requirement that, when disposing of designated land, those charities are required to publish the proposal. Designated land is land that is often of considerable value to the charity and of particular importance to the local community. We think this is an important safeguard that can help to inform trustee decision-making and engage the local community. Again, we are pleased that this requirement, which is in current legislation, will be retained.

We have touched on recommendation 43, which was the proposal that the Charity Commission should not be required to obtain the Attorney-General's consent when making a reference to the Charity Tribunal. We think that this issue is of marginal relevance to charities, because so few

references are made. We can see arguments on both sides, but ultimately we respect the position that the Government have taken, on the basis that the consent of the Attorney-General could be seen to be a helpful check and balance.

Those are just a few of our comments on the recommendations. There are a couple of other Privy Council-related recommendations in relation to guidance. As Chris said, there is currently quite a lot of guidance on the website. It could be expanded, but we do not think that this is a particularly significant issue.

The Chair: What about recommendation 40, I think, where the Charity Commission has a conflict of interest and the question then is whether it sensible to require the permission of the Charity Commission to take charity proceedings? No permission is required to appeal to the tribunal, because those are not charity proceedings, but it is to appeal to the High Court. What do you feel about that? The Charity Commission and the Government will say that they can sort out some Chinese walls and that would be perfectly all right. What do you feel?

Lucy Rhodes: It is difficult to see how information barriers would provide a complete solution to that sort of issue. Similarly, with regard to some of our responses to other recommendations that have been rejected, I am aware from evidence from Aarti Thakor at the Charity Commission that this issue has not come up before. Again, we do not think it is of particular significance to charities, so I do not have further comment on that.

The Chair: You have had no personal experience of that.

Lucy Rhodes: No. I believe that charity proceedings tend to involve internal wrangling between members of the charity and do not typically involve a conflict of interest on the part of the Charity Commission.

The Chair: What about the CLA on that?

Chris Priestley: I echo what Lucy has said, and the majority of proceedings taken by charities are against the Charity Commission and heard in the First-tier Tribunal, which are not classed as charity proceedings. They do not need the Charity Commission's involvement, so I do not think our members who have discussed this matter felt that it was of particular concern, again for the reasons Lucy articulated.

Q17 **The Chair:** One of the things that has been mentioned from time to time is the question of delay, which I am quite interested in—that everything takes a long time to get consent or to have a refusal. Do you want to say anything about any of the provisions in the Bill, or not in the Bill, and about trying to restrain or restrict the delay in making progress with, let us say, court proceedings or resolution of issues? Is it a problem or not?

Chris Priestley: In practice it is a problem, but I am not sure that the Bill will be able to do too much about that. It is down to the resourcing of the commission and its processes and procedures. If we proceed on the

basis that the Bill provides as enabling and clear a framework as possible, and if that is supported by clear guidance and procedures so that there is a route map of how to get there, one would hope that that is prioritised and that there is a process. I know the commission will have to look at adapting its processes and procedures in light of the Bill and whether that can be dealt with as swiftly as possible, because it is in nobody's interests to hold up the spending of charitable funds.

Lucy Rhodes: One of our concerns about the repeal of Section 275, which is the power for unincorporated charities with an income below £10,000 to change their purposes, and about the repeal of Section 268, is that currently there is a fixed 60-day window for the Charity Commission to object or to impose additional requirements. Failing that, the resolution comes into effect after 60 days. Currently, we think that mechanism for smaller charities to make changes is helpful, in part because it has that fixed 60-day window.

We are aware that the alternative mechanism, which has been suggested by the Law Commission, would be to use the new amendment power, will require in many cases submitting an application to the Charity Commission, which involves an open-ended process of waiting for the Charity Commission's response. Depending on the Charity Commission's resources, that could take three or four months to receive. We think that those provisions being repealed in the Bill help to manage that potential delay, and that is one of the reasons why we think that repealing those provisions is not helpful.

Nicola Evans: On some of the concerns raised in the working party about the current provisions in the Act, many charities, particularly smaller charities, do not have advice and do not feel confident about relying on that 60 days. In particular, I suspect that these charities will not look at the legislation; they will look at the commission's guidance. For example, the commission's guidance on some of these provisions takes them through the steps and then says, "Then send the online form to us for approval, which the commission has to give within 60 days". So the charity's impression is, "Oh, we wait for the approval".

I think that in practice, from the charity's perspective, it will often be the same as it is at the moment, whereby approval applies automatically from 60 days unless you have heard from the commission or you get approval in advance. I think the question is how the process is going to work under the new process under the Bill. If it is going to take longer than 60 days, that is not a good thing. That is the question for the commission's processes and resources.

The Chair: Rather than imposing 60-day time limits at various stages in relation to the recommendations in the Bill, would you be content just to say that what is really needed is more resource?

Chris Priestley: It goes back to the point at the outset about the balance between facilitation and self-help—allowing charities to do things without recourse to the commission, but being mindful of trustees' legal

duties to act in the best interests of the charity and requiring charities to have to run something past the commission. If you have to run something past the commission, inevitably that adds to the time. I suppose it is balancing how much we want to allow charities to do for themselves and how much we want them to have oversight of the regulator.

Nicola Evans: Going along with that is the fact that the vast majority of charity trustees are volunteers. They are doing this on top of their day job. In many cases, probably in most cases, they do not have access to professional advice. There is a value for them when they are told that they have to run something by the commission in order to have a positive response that they know they can rely upon, rather than something going off into the ether and then it is, "Well, we think we can rely upon it, but how sure are we?"

The Chair: Thank you. That is all I have to say to start with.

Q18 **Baroness Barker:** What are your views on the level to which the Attorney-General has oversight of the Charity Commission, as reflected in this Bill?

Chris Priestley: It is important to be clear about the Attorney-General's role. Oversight is an interesting term in that context, because the Attorney-General has a specific role in protecting the interests of charity, and obviously we are mindful of Section 13 in the Act that says that in the exercise of its functions the commission is not subject to the direction of control.

I take the point that that is not oversight, but it is not subject to the direction of control of any Minister of the Crown or any government department. When we looked at this, we agreed with the Government's response that the Attorney-General plays an important role in protecting the interests of charities and that that is distinct from the role of the Charity Commission. I think that is why the Attorney-General is always a party to charity proceedings in court as that constitutional protector of charity.

Of course, the Attorney-General can also refer, and has referred, questions of charity law to the Charity Tribunal. Those matters are unaffected by this Bill, I think. The question that Lucy has already touched on is whether the law should be changed to allow the Charity Commission to make references without the consent of the Attorney-General, and I think that on balance we agree with the Government's approach that the Attorney-General's consent should still be required.

Q19 **Baroness Barker:** The question of working names has exercised you greatly. In light of the response from the Law Commission, what do you now think?

Nicola Evans: Pretty much the same. You will have seen that the working party has raised concerns about the proposal on working names. The committee will of course be aware of the very extensive consultation

and review process that has preceded this Bill. The concern for us is that the working names proposal has not gone through that process, so it has not been tested through that process. It is something of an unknown.

We do not know what practical issues may arise from the implementation of this provision, and that concern is compounded because "working names" is not presently a defined term in charity law. The definition in the Bill is entirely new. The Charity Commission put on its register other names of charities, some of which it refers to as working names, but when it asks for other names which the organisation is known by in the registration process, it does not ask, "Do you have any working names?" It asks, "Are there other names by which your organisation is known?" So it is not clear to us that the sector will be clear about what a working name is. Again, we are somewhat in the dark as to whether there may be issues with this proposal.

In particular, it is not trivial for a charity if they are on the receiving end of an order to stop using a working name. A famous example of a working name for a charity is Comic Relief. It is not the registered name. The registered name is Charity Projects. The working name for a charity could be all through the charity's branding on its website and on all the fundraising literature, so it would be an enormous exercise in some cases, possibly in many cases, if a charity were told to stop using that name.

Again, it is just the fact that it has not been tested and there are all these potential ramifications that we do not know might arise.

Baroness Barker: I accept that, and I understand that quite often charities have formal registered names that are not the names they work under, because they cannot trademark certain words or there are IP considerations. For example, I used to work for Age Concern and we could not trademark Age Concern. We had to trademark our brand and license it that way.

Given what you said, Professor Hopkins has written to say that amending guidance on the subject should be helpful. Do you not agree with that?

Nicola Evans: I am not able to say whether that would deal with the problem. As I say, it has not been tested, so there may be issues that we are not aware of that could come out in the implementation.

Baroness Barker: In some sense this is not a new problem, a new issue. Comic Relief is 30 years old, and people have an understanding of what a working name is because they get on with it.

Lucy Rhodes: As Nicola said, the concept of working names is not new, but it is new to charity legislation. Currently the formal or legal name of all registered charities must be entered on the charities register, and if the charity changes its name that has to be notified to the Charity Commission. Of course, the Charity Commission allows charities to enter

what Nicola has described as "other names", which is the term that the Charity Commission uses, but that is optional on the registration form.

In other words, currently there is no requirement to register working names, and although the Charities Bill adds this new enhanced power for the Charity Commission to direct a charity to cease using a working name, it does not introduce a requirement for charities to register their working names. We see a potential practical difficulty for charities in identifying other charities' working names, because they are not required to be registered. This issue could be mitigated in part by the Charity Commission requiring charities to register their working names, but that is not going to provide a complete solution, because that is not going to capture the working names of unregistered charities.

Another potential practical issue relates to the consistency between the definition in the Bill and the Charity Commission's current interpretation. As the Law Commission noted in its supplementary evidence, it was not clear to some members of the Charity Law Association and to us what the definition in the Bill was intended to capture. The Law Commission amended the Explanatory Notes, which now have a helpful section of guidance that explains what a working name is intended to capture under the new legislation. We understand from the Explanatory Notes that a working name is intended to capture other labels for the charity, so, taking Nicola's example, Comic Relief as opposed to Charity Projects. It is not intended to capture the charity's specific projects, activities or campaigns. Carrying on with the Comic Relief example, it is not intended to capture Sports Relief, which is an event run by Comic Relief.

A potential practical issue is that currently Sports Relief and plenty of other names, which are listed on the Charity Commission's register as working names but are in fact the names of events and activities, are currently on the register. There will be a bit of clearing up to do to make sure that the definition in the Bill matches up to what is currently on the Charity Commission's register, which we think could cause a bit of confusion if that is not clarified.

Those are just a couple of practical issues that we have identified. As Nicola said, had we had the proper opportunity to think through all the issues through consultation, it is possible that many more would have cropped up.

We just asked our charity trademark attorney to have a look at the new legislation, and he raised a number of issues, including the threshold at which rights in a working name could be acquired, as well as the lack of checks and balances to prevent potentially unfair outcomes, in contrast to trademark legislation, which is underpinned by centuries of case law. Those sorts of points get quite technical, and we would be happy to follow up with a written submission, if helpful.

Those are just a few examples of some of the potential difficulties that might crop up in practice when the new legislation comes into effect.

The Chair: Why could all that not be dealt with as the problems reveal themselves or in relation to further advice given by you to the Charity Commission? Why can it not be dealt with by guidance by the Charity Commission? Is there anything that you have mentioned that requires further legislation or change to the legislation?

Lucy Rhodes: I am not sure that it requires changes to the legislation, and certainly some of these issues can be addressed through the Charity Commission's clearing up the register so that the definition of working names matches up to the definition in the Bill. Some of this could be mitigated by charities instructing trademark attorneys to carry out thorough research in relation to potential working names. It is just that this potentially adds a new layer of risk for charities, and I just do not see how that could be mitigated. As I said, unregistered charities are not required to register their working names. That is just one potential practical issue where it is difficult to see how guidance could mitigate.

The Chair: You could get a problem at the moment of an unregistered charity having a particular working name, and the same working name being adopted by a registered charity, which is also a problem.

Lucy Rhodes: Yes, exactly. That is also a problem, but currently the Charity Commission does not have a power to direct one of those charities to cease using a working name, so it is more about what might happen as a result of the fact that two charities have similar working names under the new legislation.

Nicola Evans: You can see the problem that is looking to be solved, and in principle we do not have a problem with that. Our problem is that the solution that has been put forward has not been tested, in contrast to everything else that has been tested over years of consultation and review. Our difficulty is that we cannot say if it will achieve the aims: first, the solution it is meant to achieve; and, secondly, the aims of reducing bureaucracy and maintaining proper oversight. If problems have to be dealt with piecemeal as they arise—meaning potentially a legislative amendment—all this has a cost, so we are adding cost where we are meant to be taking it away.

The Chair: Are these points that you have made to the Law Commission and the Charity Commission on this part of the Bill?

Nicola Evans: Yes.

The Chair: Yes, but they feel that they can manage it.

Nicola Evans: Yes.

The Chair: Your view is that you may or you may not be able to. You do not know, basically.

Nicola Evans: Exactly.

The Chair: Is that a fair summary: that people just do not know? I do

take the point that, because the Charity Commission has no oversight of unregistered charities, it places registered charities in a rather more difficult position or they all become registered. There is no comprehensive, easily accessible data—that is the point you are making—which would show you whether, across the whole field of charities, registered and unregistered, somebody is using the name you want to use. That is what it comes down to.

Lucy Rhodes: Yes. That is certainly one of the issues at the moment: the detectability of working names for charities that are thinking about either changing their name or adopting a new working name.

Laura Soley: The second issue is that at the moment there is no obligation to register a working name, and that could be resolved in the Charities Bill. For registered charities, they can choose to register a working name, but they do not have to.

The Chair: Are you saying that it would be better if they had to register?

Laura Soley: If these provisions are to progress, I think it would be helpful if they did have to. As Lucy said, that would involve some tidying up of the register, because we can see that some of the names on there already do not conform to the proposed definition of working names.

Baroness Barker: The question of unregistered charities is a perennial issue that I do not think will be solved by this legislation anyway. Working as I do with a number of charities, particularly start-up charities, there was a time—pre the internet—when the Charity Commission register was the definitive place to go. It is now much easier to detect people coming along and using a name that might be similar to the name of your charity. It is not quite as you say. There must also be some interplay with the fundraising regulator requirements. I think we are in danger of looking at this a bit too narrowly, perhaps.

You mentioned having talked to your colleague who works on trademarks, and you mentioned checks and balances. It would be helpful if you were to write to us with some of those.

Lucy Rhodes: I would be happy to.

The Chair: Very well. Thank you very much. We will now ask particularly about smaller charities.

Q20 **Lord Cruddas:** Mr Priestley touched on this question in his opening presentation. Are our smaller charities advantaged or disadvantaged by the Bill? If disadvantaged, what would you recommend?

Lucy Rhodes: On the whole, our view is that the Bill will help smaller charities by removing unnecessary complexities and inconsistencies in the law, which will make it easier for those charities to apply it without the need to obtain additional support. As we have already heard, most of the charity sector is relatively small. Around 44%, I believe, had an annual

income of less than £10,000. We need to bear that in mind when thinking about whether aspects of the Bill will help or hinder smaller charities.

The Bill will also give charities new or additional powers that will help them to manage their assets in a more flexible way. There is a more flexible regime for disposing of charity land, for example, and there is also the power to make small ex-gratia payments. These are the sorts of changes that collectively will make it easier for trustees to administer their charity and focus their attention on charitable activities, which is really good news for the sector.

As Laura has already mentioned, we have concerns about the impact that a couple of changes in the Bill—the repeal of Sections 275 and 268—will have on smaller charities. Section 275 is the power for unincorporated charities with an income of less than £10,000 to change their purposes. Section 268 and following is the power for unincorporated charities to transfer all their property. We see charities use this to merge or to incorporate—to change their structure to an incorporated structure.

The repeal of these provisions did not form part of the Law Commission's original consultation. In fact, consultees generally supported the retention and expansion of those provisions to corporate charities, which is what the original proposal of the Law Commission had been. Our experience is that charities regularly use these provisions and that they provide a clear, simple and well-understood mechanism for small charities to make changes.

The Law Commission's principal rationale for repealing these provisions is that the new amendment power removes the need for them, making them redundant. The new power can be used to amend a charity's purposes, like Section 275. That would be subject to Charity Commission consent in a similar way. Although the new amendment power is not the same as a bespoke power to merge, which is Section 268, it can be used to add a power to merge to a governing document, which the charity can then exercise.

The Law Commission said in its supplementary evidence that the new amendment power can be used to achieve the same objectives as Section 268 and Section 275. While that is correct in our view, the process for achieving these changes using the new amendment power is less flexible and will take longer, and for Section 268 resolutions—that is, the power to merge—will take a lot more steps. Under the new regime, a charity would be required to go through an amendment process to add a power to transfer to their governing document. Then, that power and the governing document in its entirety will shortly afterwards become redundant, because the charity is adding that power in order to merge with another charity. This will often involve waiting for charity commission consent, which could take a few months.

By contrast, Section 268, like Section 275, has this fixed 60-day time limit, so, regardless of what the Charity Commission's filing form or the guidance says, the law says that after the resolution has been filed with

the Charity Commission, it will come into effect 60 days afterwards unless the Charity Commission objects or imposes additional requirements. That provides really helpful certainty and a quite short timescale for these resolutions to come into effect.

I would be happy to provide more detailed illustrations in relation to how the two regimes differ, but essentially we think that the benefits of these powers outweigh the perceived benefits of having what the Law Commission calls just one uniform power. We think that repealing them will result in more red tape and potentially more cost for smaller charities.

The Chair: Thank you. What does the CLA think about that?

Nicola Evans: As Chris has mentioned, the CLA was very mindful throughout that whatever was put in place through this Bill works for charities. In fact, one of the principles that I mentioned which we kept in mind was "Think small first", a principle that we borrowed from when the Companies Act was brought in, whereby the same approach was taken in recognising that most companies are small companies.

"Think small first" does not necessarily always mean taking away regulations. For example, when we looked at the provisions in the proposals on charity land, it tended to be the larger charities that wanted a deregulatory approach, whereas the smaller charities liked the framework that was there. It gave them reassurance that if they acted within that framework, they would be doing the right thing. They were very much wanting to maintain regulation, albeit with some improvements within it, which is what we now have in the Bill.

We were very much looking for flexibility and consistency. I know that concerns are being raised in respect of these provisions. In our response, we recommended that if the new power that would be Sections 280A and 280B in the Bill/Act, which we recommended, were brought in, the provisions in Sections 268 through to 280 currently in the Act could be repealed. That was because of the concerns that were raised in respect of how those provisions work at present, such as the lack of confidence in being able to rely upon that 60-day provision.

I appreciate what the Law Commission said in its response, which, as Lucy has said, is that under the new power charities can do everything that they can do under the current provisions, just in a different process. Of course, that begs the question: what is that process, and will it be advantageous or disadvantageous to charities?

Some of that process is set out in the Bill. Again, I can run through some of it and provide further supplementary detail if you want, such as the resolutions that are required that are not required at present—for example, a members resolution—the majorities that apply, and the fact that it is prior written consent rather than the 60-day cut-off. There were different views within the working party, but the majority accept what is in the Bill on those provisions. Potentially, the more important aspects

with regard to how it will work, particularly for small charities, are the bits that are not in the Bill, such as how the Charity Commission will implement this process. That is a point for the guidance and the processes of the Charity Commission.

From our point of view, the question is: will the Charity Commission be in a position to put in place a process that will work as well for small charities, and preferably better, than what is currently in the Bill? If the answer is no, what do we need to change in the Bill? What would be needed to correct that position?

On the purposes provision, given the views that were put to the working party I think we would still stick with the Section 280A power, because one of the main concerns was whether you could rely upon that 60-day cut-off. Of course, when you are applying to change your purposes, you cannot use the power to change to purposes that are not charitable. If the commission came back even after 60 days and said, "We don't think the new purposes you have changed to are charitable", the power would never be engaged. For small charities in particular, there is a value in having the certainty that the purposes they are changing to are charitable purposes.

The more difficult question—again, I would be happy to provide something in writing to set out more fully the pros and cons and what we might be looking for in the process outside the Bill—relates to Section 268 and the surrounding provisions process. In particular, the working party recommended that where a charity has permanent endowment, does not have a power to transfer, and wants to transfer its permanent endowment to another charity, the power to do so should be more widely available than is currently available under the mechanism in the Act.

If you cannot use the current mechanism in Section 268, getting help from the Charity Commission can be quite a complicated process, whereas with a resolution it is very straightforward: you send in the resolution, and if the Charity Commission does not object it is okay. If that was not replicated, the process would not be the same and would not be as good. There may be the option for a legislative solution there if the Charity Commission felt that it could not replicate that. Of course, for the Charity Commission it is also very cost-effective process if it does not have to do anything extra.

Q21 **Lord Bellingham:** Can I move on to permanent endowments, please? Certainly what the Bill recommends is welcome, and there seems to be general support for it. Just on the specific point about raising the capital limit to £25,000, I think it was Bates Wells's submission that pointed out that by removing the income test you are solving one problem but creating other problems. Certainly one can envisage that in days past when interest rates were 8% and 9%, a capital fund of £30,000 would bring in an income of well over £1,000, but you can certainly envisage in today's very low interest rates a capital sum bringing in well less than £1,000. Maybe even a sum of £100,000 in some circumstances, if it is in a portfolio-type investment, could well bring in substantially less than

that amount.

Just generally, on the changes that have been recommended, do you think that we should go further? What would your view be of making those adjustments?

Lucy Rhodes: That is exactly the issue that we have picked up, and I believe the Charity Law Association has also spotted. Currently, if a charity has an annual income of less than £1,000, or the capital value of the permanent endowment fund is £10,000 or less, the charity can use the Section 281 regime for smaller charities to spend their permanent endowment to release the permanent endowment restrictions on the fund. That does not require Charity Commission consent. If the income of the charity is over £1,000 and the capital value of the fund is over £10,000, the trustees have to use the Section 282 regime, which requires Charity Commission consent.

Under the Bill, these financial thresholds would be replaced with this single capital threshold of £25,000. The rationale that the Law Commission's supplementary evidence refers back to is that removing that income threshold creates consistency for unincorporated and corporate charities. That is correct, and it is an issue that needed to be addressed.

But the practical outcome of this change is that it will limit the number of endowment funds that can use the more light-touch Section 281 regime. Many funds valued between the capital threshold of £25,000 and £50,000, and potentially even larger funds, which currently come under the scope of Section 281—the more light-touch regime for spending permanent endowment without Charity Commission consent—will under the Charities Bill come within the Section 282 regime, which requires Charity Commission consent.

Lord Bellingham: How onerous and how expensive is it to get Charity Commission consent, and how quickly can it be done?

Lucy Rhodes: The process for Sections 281 and 282 involves passing a resolution. That resolution comes into immediate effect if you are using the Section 281 regime, so it is a quick process. For Section 282, it is necessary to add to that resolution a statement of reasons, which is essentially the case for releasing the permanent endowment restrictions. That is then filed with the Charity Commission, and then there is a three-month period during which the Charity Commission consents.

Lord Bellingham: If a charity goes to a firm like Withers, they will be paying a lot more than going to my local firm in King's Lane, for example. Great respect to Withers, who I am sure would do a fabulous job. If you go to an average law firm, what will it charge you for managing this process?

Lucy Rhodes: The difficulty is that the average law firm probably would not have the expertise to deal with the complexities of this. That is the issue. Charities can use these provisions on their own, but when Charity

Commission consent is required, an extra layer of thinking is involved in building that case for releasing permanent endowment restrictions. It does make a difference. This change will essentially increase red tape for charities whose funds will be brought within Section 282 and that require Charity Commission consent.

We think that the inconsistency that I mentioned, which is the rationale for the changes, could be addressed with a simple amendment to the Bill. If that is not palatable, we think that that threshold should be increased to £50,000.

The Law Commission looked at alternative thresholds. I think the figure it looked at was £100,000, a figure that some consultees had suggested, and it dismissed that on the basis that that would be too big an increase. We think that £50,000 probably strikes a good balance, and it would result in the funds, which are currently able to use Section 281, being able to continue to use Section 281 and not being disadvantaged by the new provisions.

Lord Bellingham: It makes sense. Thank you.

The Chair: You say that it would be a very simple amendment to the Bill. Somebody has to formulate the amendment and where it would be. Do you have a formulation for your proposed amendment?

Lucy Rhodes: I do not have anything drafted in front of me, but I think it would be a matter of a few words, potentially. Again, it would need to go through proper scrutiny. The issue currently is that it goes back to the way in which charities hold property, and there is a difference between unincorporated charities and corporate charities. Essentially, because of that distinction, unincorporated charities are disadvantaged when it comes to applying the income test, because you are looking at the income of the whole unincorporated charity, whereas for a corporate charity you are just looking at the income of the endowment fund. We think that potentially you could just amend the wording of Section 282, which currently refers to the income of the charity, to refer to the income of the fund.

The Chair: Perhaps you could let us have a suggested amendment.

Lucy Rhodes: Yes, I would be happy to.

The Chair: Thank you. That is very helpful.

Q22 **Baroness Goudie:** Good afternoon. I have two questions that perhaps we could take together. Is the power to amend trusts sufficiently unbureaucratic and flexible? Further, in the rules for amending and governing documents, is there an appropriate consistency between the types of charities? I would like to get your views on that, please.

Laura Soley: We certainly very much welcome the new broader power for trustees of unincorporated charities to amend their governing documents, which extends the current power in what is now Section 280

of the Charities Act, and that current power is limited to making administrative changes. Under the new power, trustees will be able to amend any provision of the charity's governing document, which is very welcome indeed. It is particularly welcome that this new power enables unincorporated charities to change their objects, subject of course to Charity Commission consent, without having to seek a cy-prés scheme.

As you will know, currently there are three main ways to amend the objects of an unincorporated charity. The first is using express power in the charity's governing document. The second, for small charities, is using the Section 275 process that we have talked about. If there is no express power and you cannot use Section 275, you currently have to seek a cy-prés scheme from the Charity Commission. Even assuming that the requirements for a cy-prés scheme can be met, it can take a considerable amount of time and will usually necessitate taking legal advice. This new power will enable unincorporated charities, which have no express power of amendment and cannot use Section 275, to change their objects without a scheme.

It will also allow all charities, regardless of their legal form, to change the purposes of donations and legacies that are made to charities for specific purposes, which are usually treated as being held on trust, for which a scheme is normally required at the moment. For example, where a corporate charity receives a legacy for a particular purpose or activity, it will now be able to use this Section 280A power, so this could save many charities time and money.

There are a few areas where we have flagged our concerns in the submission. First, the new broad Section 280A amendment power is available as an alternative to any express power of amendment contained in the charity's governing document, and the new Section 280A power cannot be excluded or restricted by the charity's governing document. If there is an express power in the charity's governing document that requires, for example, trustees to take a unanimous decision to change the charity's objects, the trustees can choose to use the new power instead to get around that hurdle.

As the Law Commission recognised in its report, unincorporated charities may have express power to amend governing documents of theirs that require particular conditions to be satisfied, which are likely to have been carefully framed by the charity's founders to suit the charity. Although the Law Commission said in its report that it does not want to interfere with existing express powers of amendment, one outcome of introducing the new broad power is that it can be used as an alternative to an express power, so the express power is essentially usurped. As the Charity Law Association noted in its response to the Law Commission's original consultation, this contrasts with the amendment powers for companies and CIOs, which can be made subject to express requirements or entrenched provisions, and it also contrasts with the new power for royal charter charities contained in the Charities Bill, which does not apply where there is an express power available.

Our view is that charity founders ought to be able to restrict or modify the application of the new power, which would put unincorporated charities on an equal footing with other charities.

Secondly, where an unincorporated charity has a separate membership, under the current Section 280 power any amendment of the governing document is subject to approval of a two-thirds majority of members. However, under the new power that is increased to 75% of the members. Although this brings the power broadly in line with the amending powers for corporate charities, we wonder whether the benefits of alignment are outweighed by the disadvantages of increased red tape.

Finally, on the new Section 280 power, as you may know Schedule 6 to the Charities Act contains a list of Charity Commission decisions that are appealable to the Charity Tribunal. Under the current law, where the Charity Commission makes a scheme to amend the purposes of a charity, that scheme may be appealed to the Charity Tribunal by the trustees and by anyone affected by the decision, which will include the charity's beneficiaries. As you may know, most of the cases that have been heard by the tribunal have been in relation to schemes allowing charities to change the purposes of designated land, such as recreation grounds and school sites, which is an area that often generates a lot of local feeling.

Schedule 6 to the Charities Act also contains provisions for trustees and anyone affected to appeal a decision of the Charity Commission to give or withhold consent to amendment of objects or other regulated alterations of the articles of the company under Section 198 of the Charities Act, and the Charities Bill amends the equivalent provision for CIOs to bring it in line with that of companies. We could not see that any provision has been included in the Charities Bill to enable the trustees or beneficiaries of unincorporated charities to appeal to the Charity Tribunal a decision of the Charity Commission to give or refuse consent to a change of object or other regulated alterations made under the new Section 280A power. We could not see any reason for this inconsistency, and we regard it as hugely important that unincorporated charities and their beneficiaries, just like corporate charities, should be able to appeal Charity Commission decisions to the Charity Tribunal.

The Chair: Could you give me an example of a situation where there should be a right of appeal?

Laura Soley: Yes. As I am saying, under the existing provisions, where a Charity Commission scheme is made to change objects, the trustees of the charity and their beneficiaries can appeal that decision to make a scheme to the Charity Tribunal. That often happens where there is particular local interest, for example where it is changing the purposes of designated land. There are equivalent provisions under Section 190 and, I think, Section 227 at the moment in relation to companies and CIOs. I think it has perhaps been overlooked that the new Section 280A power now extends to what are equivalent to regulated alterations for unincorporated charities, but an equivalent right of appeal has not been included in the Charities Bill.

The Chair: I was looking for a particular factual situation as an example.

Laura Soley: For example, if the Charity Commission refuses to give consent to a change of object for a charitable company, the trustees of that charity might want to appeal that refusal to the Charity Tribunal, so to appeal the Charity Commission's decision to refuse consent. Now, under the Charities Bill, there is an equivalent provision for CIOs, but there is not an equivalent provision for unincorporated charities under the new power.

The Chair: Okay. That is a refusal?

Laura Soley: To give or to refuse consent. Where beneficiaries challenge, it is usually where consent is given rather than refused, so where beneficiaries do not think that the change to the object is appropriate.

The Chair: Thank you. That was it?

Laura Soley: I have more comments on the alignment, but it might be worth passing to Nicola and Chris for any comments on the new power before coming back.

Nicola Evans: The CLA working party advocated for this new power and very much would and does welcome the flexibility that is provided by the new Section 280A and Section 280B power in the Bill. The working party was also very clear that the benefit to having that provision requires that there should not be a provision to exclude it in underlying documents. If that was allowed, it would rather undermine the purpose of including the power in the Bill in the first place, which is essentially to establish a statutory regime to amend governing documents of unincorporated charities, which sits alongside, as closely as possible, the statutory regimes for amending the constitutions of companies, where they are charities, and the statutory regime for amending CIOs.

It was always accepted within the working party that although we were aiming for consistency on the basis that we felt that a more consistent legal framework is easier to understand and to regulate, we recognised that achieving consistency was not going to be possible in all cases. For example, the regime in Section 280A in the Bill has the provisions that require prior consent of the Charity Commission there is a longer list than the equivalent for companies and CIOs. That was in recognition of there being certain rights within an unincorporated charity framework that require that additional level of safeguard, which is present in the Bill through the Charity Commission's prior consent.

On the provision and the sorts of situations that were being referred to, the view of the working party was that the Charity Commission is well versed when it comes to giving consent in considering the interests that should have been considered by the trustees before they bring this to the commission. Indeed, there is a new provision in the Bill, which applies for unincorporated charities and is brought in for companies and CIOs, that

the Charity Commission, when it is giving consent in these circumstances, can require that public notice be given. There is a facility there to enable interested parties to be given notice of what is proposed and to make their views known.

We would definitely support the provision that is there at the moment, which is that this power applies notwithstanding what is in the governing document, and it should not be excludable, because in practice you could end up with it not being applied to any governing documents if it was excluded by all of them.

The Chair: You take a different view from Bates Wells on this particular point. You say that, irrespective of however restrictive amendments might be under the constitutional documents, the statutory power should have priority.

Nicola Evans: Yes, and it is not a way of getting around the express power. It is the fact that there is an alternative power available that Parliament has provided for, and Parliament has put safeguards within that structure, which is available through the Charity Commission oversight.

We also consider that not all inconsistency is bad. It is recognised that a charity that has a wide express power can continue to use that express power, but that was not a point that the Bill was looking to address. The Bill was looking to put in place a statutory framework that was aligned with that for charitable companies and CIOs, that would be available for charities that did not have an express power, or that would be available to them to use in addition to the express power.

The Chair: What about the power of appeal point?

Nicola Evans: Again, in line with the consistency, if there is a power for appeal where the Charity Commission refuses consent for a company or a CIO, we would support an equivalent for the equivalent decisions for an unincorporated charity.

The Chair: You think there is a lacuna in the Act in that respect.

Nicola Evans: I have not checked the precise provision, but as it is explained, yes.

Q23 **Lord Bellingham:** Finally, we have almost run out of time, so I have a question about anything that might have been left out of the draft Bill as it stands. Is there anything that you can particularly think of that should be included? I noticed that Bates Wells came up with the suggestion for a social disposal power. Maybe you could comment quickly on that and on anything else that you can think off, although we do not want to turn it into a Christmas tree, adding on a whole lot of different things that might be out of the scope of the Bill anyway and might delay it. Is there anything specific that would be a really burning issue that you would like to see dealt with?

Laura Soley: I am happy to talk to the proposed social disposal power, which is really just a modest change to the current provisions relating to disposals of charity land, to clarify the basis on which property can be disposed of as a social investment.

Under the current Charities Act provisions, the restrictions on disposal of property contained in Part 7 of the Charities Act do not apply to any disposal made by a charity to another charity otherwise than for best price. In other words, it is possible to dispose of a property to another charity for less than best price, including as a social disposal, where it is made partly for financial benefit. Under the amendments contained in the Charities Bill, charity-to-charity disposals are no longer excluded from the compliance requirements if the disposition is a social investment. The Explanatory Notes to the Bill provide that that is to ensure that where price is a motivation factor, even if it is a partial one, charities have to comply with Part 7.

A charity-to-charity disposal will be exempt from the new regime only where financial benefit is not a consideration at all for the trustees, and social investments will become subject to the requirements of Part 7, including requiring a report from a designated adviser that the disposal is on the best terms, as it is partly being made for financial return.

Our experience is that the normal advice provisions contained in Section 119 relate to the best terms, and this is currently confusing and unclear and is often interpreted, rightly or wrong, to mean the best financial terms or the highest price. It causes a lot of confusion and uncertainty in practice in relation to disposals of property as social investments. Our view is that it would be preferable to clarify the basis upon which social disposals can be made.

We are calling them social disposals rather than social investments, because we think it is a more accurate description of what is going on, where a charity wants to dispose of land in a way that leads to some financial benefit and to advance the mission of the charity. We are just proposing some modest amendments, which would still provide that trustees are obliged to obtain a report from a designated adviser on the disposal, which is obviously desirable because a social disposal is a valuable asset, and at least part of the decision-making rests on financial value considerations.

Critically, at the moment the reference to "best terms that can reasonably be obtained" is interpreted in purely financial terms. We are suggesting a modest tweak in the context of social disposals so that the best terms of the disposal expressly involve consideration of financial benefit and mission advancement.

Lord Bellingham: That is very helpful. Perhaps you could let us have a small draft amendment on that as well.

Laura Soley: I am happy to.

Lord Bellingham: Excellent. Thank you.

The Chair: What about the CLA on this point?

Chris Priestley: On the question about whether anything has been missed out, I take the point about Christmas trees and not having too many extra baubles. We have engaged in a long process with the Law Commission and consultations. Nicola reminded me that it started in 2015 and maybe a little before then.

Other than the points that have been raised today, I do not think there was anything in particular, other than that in the written evidence that we submitted we agreed that the existing definition of permanent endowment in the existing legislation is not as helpful as it might be. We are also not sure that what we are getting in the Bill is as good as it might be, and we can add more evidence. We have suggested some alternative drafting.

There are a couple of other points that might be considered again relating to the factors the commission has to take into account when looking at a change of object for a charitable company, because we are moving to align the existing cy-prés scheme that does not quite work for charitable companies, particularly if you have to look back at the original purposes of the company when it was set up.

There are also a couple of points on the Charity Commission's ability to authorise remuneration or benefits retrospectively. Again, we are happy to provide additional evidence.

We have not consulted our members on Bates Wells' social purpose disposal. It is a very interesting proposal. My sense is that many members would support it. Others may say, "We think you probably can do that already under the existing regime", particularly if you look at the—

The Chair: That is basically what Professor Hopkins is saying: that under the combination of the existing regime and the amendments in the Bill, this can all be done anyway.

Chris Priestley: It might be helpful to have guidance from the commission to say that the social investment power enables you to do this. The uncertainty is unhelpful. I agree about clarity being helpful.

Nicola Evans: We asked specifically during the consultation process about having clarity as to how disposals that are made as social investments fit into the structure. It is clarity that we need here.

The Chair: It may not need legislation. It may just need some clarification. We will see what amendment you are proposing.

Laura Soley: Our proposed amendment is intended to clarify the position on the face of the legislation.

Q24 **The Chair:** As has been pointed out, we have rather overrun, but is there

anything further that you are burning to tell us or you feel we really ought to know about that has not been covered, within the confines of the technical nature of this Bill?

Lucy Rhodes: The only thing that I might add is that it is clearly a highly technical Bill, and as we look closely at the provisions we start to spot a couple of drafting errors. When we follow up on the points that we have discussed, we would be very happy just to include a list of drafting issues.

The Chair: That would be very helpful. Thank you. Thank you once again for the written evidence and particularly for your oral evidence this morning, which has been very helpful indeed. We look forward to receiving proposed draft amendments from you as soon as possible, please.